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April 17, 1995

TO : Michael H. Trujillo, Director
Indian Health Service

FROM : Barbara Hudson, Attorney
Office of the General Counsel

SUBJECT : Construction and Title III of the Indian Self
Determination Act (ISDA)

This memorandum is in response to your request that we review our former legal opinion, dated August 24, 1993. You ask if funds appropriated for constructing health care facilities may be included in an Annual Funding Agreement (AFA) under Title III? Initially, the question appears relatively simple and straightforward. However, we must consider, not only whether funds may be included in an AFA, but the law governing the obligation and expenditure of such funds. For example, does including construction¹ funds in an AFA change the relationship between the tribe and the Federal government? In other words, is a tribe permitted to take over all Federal functions related to the direct Federal construction of a facility² simply because it has funding in its AFA? Alternatively, may the tribe use the construction funds in an AFA for the construction of a tribal facility under tribal procurement rules? To answer these questions, we examine decisions of the comptroller general with regard to improvement of property and the construction authority of the Indian Health Service (IHS).

¹The word construction, as used in this opinion, also includes design.

²When the term direct Federal construction is used in this opinion, we mean the construction of a facility with Federal funds and, upon completion, title to such facility belongs to the Federal government. The term Federally assisted construction means any construction involving Federal funds in which the final ownership of the facility does not reside with the Federal government.

I. COMPTROLLER GENERAL DECISIONS - IMPROVEMENT OF PROPERTY

In a long line of decisions, the Comptroller General has held that appropriated funds may not be used for improvement of private property in the absence of "express statutory authority."³ However, the Comptroller General also has held that the construction of a Federal facility on Indian land would not violate this prohibition.⁴ We note that we have found no Comptroller General decision which would support the use of Federal funds to construct a tribal facility, absent explicit statutory authority.⁵

We now turn to a discussion of what "explicit statutory authority" Congress has granted to the IHS with respect to construction of Federal and tribal facilities. Specifically, we examine the appropriation act⁶, the Indian

³ 69 Comp. Gen. 673, 675 (1990). Essentially, the Comptroller General concludes that improvement of non-governmental property through Federal appropriations is a gratuity to the owner. Under Article IV, Section 3, Clause 2 of the Constitution, only Congress has the power to disburse Federal property. (See, Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941).) Therefore, in the absence of Congressional authority, a Federal agency may not improve private property. See also, 65 Comp. Gen. 722, 724 (1986).

⁴See 6 Comp. Dec. 957 (1900) and 24 Comp. Dec. 477 (1918).

⁵We note that rare exceptions to this rule occur in the use of level of need funded (LNF) and health services carryover funds. The legislative history related to LNF funds indicates that Congress intended that these funds be used for one-time expenses associated with the expansion of space at specified facilities. (S. Rep. No. 114, 103d Cong., 1st Sess. (1993).) Relying on the clear legislative history and a comptroller general decision, we concluded that the agency could provide LNF funds for the expansion/improvement of specified tribal facilities. (See legal opinion of B. Hudson dated April 5, 1994.) A similar conclusion was reached for the use of health service carryover funds to expand a tribal facility through the purchase, erection, and renovation modular buildings. (See legal opinion of B. Hudson dated May 24, 1994.)

⁶Department of the Interior and Related Agencies Appropriations, 1995, Pub. L. 103-332, 108 Stat. 2499, 2527 (1994).

Self Determination Act (ISDA) (Public Law 93-638)⁷, and the Indian Sanitation Facilities Act (ISFA) (Public Law 86-121)⁸ with respect to construction of sanitation facilities projects.

II. IHS CONSTRUCTION AUTHORITY

A. APPROPRIATION ACT

The Appropriation Act authorizes the expenditure of funds for construction of health care and related auxiliary facilities as authorized by the Indian Self-Determination Act (Pub. L. 93-638) and the Indian Health Care Improvement Act (IHCIA) (Pub. L. 94-437)⁹ and for the construction of sanitation facilities for Indian homes and communities as authorized by the Indian Sanitation Facility Act (ISFA) (Pub. L. 86-121). Therefore, we must consider what these laws authorize with respect to construction.

B. SECTION 102 of ISDA

Section 102 of Title I of ISDA authorizes IHS to enter into contracts with tribes for the construction of Federal facilities.¹⁰ The Indian Self Determination Act Amendments of 1994¹¹ made significant changes in Title I of ISDA. First, section 105(a), as amended, states that Federal contracting laws do not apply to contracts entered under section 102 of ISDA. Second, the applicability of the Federal Acquisition Regulations (FAR) is restricted and subject to negotiation between the parties. Third, section 106(f), as amended, states that title to a Federal facility used in connection with a section 102 self-determination contract for health services vests with a

⁷25 U.S.C. 450 et seq.

⁸42 U.S.C. 2004a.

⁹42 U.S.C. 1601 et seq.

¹⁰ We note that section 9 permits the IHS to use a grant under section 102 in lieu of a contract.

¹¹Pub. L. 103-413, 103rd Cong., 2nd Sess. (1994).

tribe unless the tribe requests otherwise. However, the title is subject to a reversionary interest in the event of retrocession, recision, or termination of the ISDA contract or grant.

Thus, IHS has statutory authority to contract with Indian tribes under Title I of the ISDA for direct Federal construction projects. However, because the above sections specifically relate to contracts under section 102, we do not believe that they are applicable to Title III compacts.

C. SECTION 103 of ISDA

Section 103(b) authorizes IHS to make grants to tribes for the construction of health care facilities.¹² Title to a facility constructed under a grant generally remains with the grantee. While section 103 authorizes grants, the Public Health Service (PHS) has maintained a policy that grants under ISDA will not be used to construct facilities. However, this decision is a matter of agency policy and it is our understanding that IHS has requested a review of this PHS policy.

We note that section 105(a), which waives Federal contract and cooperative agreement laws, does not waive Federal grant laws.¹³ In the event that PHS permits IHS to use its authority to make grants for construction, it is important for IHS and the grantee to review the Federal requirements related to construction grants including requirements for Federally assisted construction. Listed below are some of the Federal requirements that we believe are applicable to section 103 grants:

¹²Such facilities may be characterized as Federally assisted construction.

¹³One might argue that this omission simply was an oversight on Congress' part. However, the legislative history does not support such a conclusion. The Senate bill, which became Pub. L. 103-413, at one time contained language which would have made Federal grant laws inapplicable to section 103 grants. (S. Rep. 103-374, 103rd Cong., 2nd Sess. 1994, 1994 LEXIS, Legis library, Cmtrpt file.) Because such language was removed prior to enactment, there is strong evidence that Congress did not intend to waive Federal grant requirements.

42 CFR Part 36, Subpart H--Grants for Construction,

Chapter IV of the PHS Grants Administration Manual (GAM) on requirements for construction grants,

Part 140 of Chapter I of the PHS GAM on protecting the Federal interest in real property acquired with grant funds,

PHS Grants Policy Statement (especially note Appendix 2),

HHS published guidelines for Federally assisted construction (HHS Technical Handbook, February 1994), and

45 CFR Parts 74 and 92.

D. SECTION 303 of ISDA

Section 303(a)(1) of Title III authorizes the Secretary to enter into AFAs with tribes for the administration of activities, programs, services, and functions. We believe that this language is broad enough to include taking over a Federal construction function. However, if Federal construction is a function that a tribe may take over under Title III, a question naturally arises as to what is the relationship between the tribe and the IHS with respect to carrying out the Federal project. Simply identifying funds in an AFA does not change the fact that it is direct Federal construction.¹⁴

While funding could be identified in a Title III AFA for use under a Title I contract or grant, we find nothing in Title III which would change or override other law related to direct Federal construction. Thus, the construction would be carried out under the provisions and authority of a Title I contract or grant.¹⁵

¹⁴As discussed below, IHS may not contract for inherent Federal functions.

¹⁵As noted herein, by virtue of section 105(a), the applicability of Federal Acquisition Regulations to construction contracts is restricted and subject to negotiation between the

E. Indian Sanitation Facilities Act (Pub. L. 86-121)

In addition to the authority of ISDA, the appropriation act authorizes construction funds to be used under the authority of Pub. L. 86-121, the Indian Sanitation Facilities Act.¹⁶ The ISFA authorizes IHS to construct sanitation facilities "by contract or otherwise" and to make "such arrangements and agreements" with tribes regarding contributions toward the construction as are equitable and will best assure future maintenance of facilities. This authority has been interpreted to give the IHS broad discretion in choosing methods of providing sanitation facilities.

Currently, construction of sanitation facilities is accomplished through an agreement authorized under Public Law 86-121 which sets forth the scope of work and method of accomplishing the work. We believe that funds may be identified in an AFA under title III for construction of sanitation facilities. However, as previously discussed, simply identifying funds in an AFA does not change the fact that it is Federally assisted construction under ISFA. As such, funds would be obligated and expended under an agreement authorized under the ISFA as currently is the practice when these projects are incorporated into AFAs.¹⁷

In summary, we believe that funds may be identified in an AFA for construction purposes. However, the AFA must specify that such funds only may be obligated and expended under a specific statutory construction authority, e.g., section 102 of ISDA, section 103 of ISDA, Public Law 86-121, etc.¹⁸

parties. Other Federal laws related to acquisition are not applicable unless expressly provided in such law.

¹⁶42 U.S.C. 2004a. The appropriation act specifies that any funds transferred from the Department of Housing and Urban Development (HUD) to IHS are used under the authority of ISFA and ISDA.

¹⁷Further, as discussed below, IHS may not contract for inherent Federal functions.

¹⁸Similarly, we note that funds appropriated and allocated under the Indian Health Care Improvement Act for construction must be obligated and expended under that authority.

III. ALLOCATION OF FUNDS

A. STATUTORY REQUIREMENTS

This opinion naturally raises questions with respect to allocation of construction funds. In addressing these questions, it is important to consider the interrelationship among the following three sections of ISDA. First, section 303(a)(6) states that the Secretary shall provide an amount equal to that which the tribe would have been eligible to receive under a Title I contract. Second, section 106(a) states that the amount of funds provided to a tribe with a self determination contract shall not be less than the IHS otherwise would have provided for the operation of the program. Further, the amount of funds may include a tribe's share of certain headquarters and area office functions, commonly referred to as "tribal shares." Third, section 306 states that the Secretary may not interpret ISDA to reduce funds that any other tribe is eligible to receive under section 102. Thus, the allocation of construction funds must be consistent with these statutory provisions.

Based on these statutory requirements, we believe that the amount of the contract is what the Secretary otherwise would have provided for the construction of the facility.¹⁹ It is our understanding that the agency provides Congress with estimated costs for the construction of specified facilities. Next, the appropriation committee identifies a specified amount in the lump sum appropriation for a particular facility. Subsequently, the agency determines final cost estimates for the facility and awards a contract for direct Federal construction. We note that the amount of the contract is based on the final cost estimate. Any difference in this amount and the amount identified in the legislative history remains with the Federal agency.

B. INHERENTLY FEDERAL FUNCTIONS

As noted in our August 23, 1993 opinion, IHS has functions which are inherently Federal, e.g., contracting officer. In other words, functions which must be carried out by a Federal employee. IHS may not

¹⁹Section 106(a)(1) of ISDA.

enter agreements which allocate funds that are associated with inherently Federal functions. Of course, it is a matter of agency discretion to determine the amount of funds necessary to carry out these Federal functions.

C. CONGRESSIONAL INTENT

IHS receives a lump sum appropriation for facilities construction. In the absence of specific statutory direction, the allocation of funds from a lump sum appropriation is a matter of agency discretion.²⁰ We note that the appropriation act usually does not require that IHS spend appropriation funds in the IHS facilities appropriation on particular projects.

However, the appropriation committee reports do specify that funding is earmarked for particular health care facility construction projects. While an agency is not bound by this legislative history, "an agency's decision to ignore congressional expectations may expose it to grave political consequences."²¹ The IHS facilities appropriation also includes funding for sanitation facilities which is distributed based on the agency's priority system.²² We find nothing in Title III that requires the agency to change its method of allocating funds appropriated for health care facility construction or for sanitation construction.

Further, as explained above, section 106(a), which governs Title III allocations under section 303(a)(6), ties funds available for compacting to what the IHS "otherwise would have provided for operation of the program." In other words, if IHS would have allocated funds for the construction of a specified facility which would serve a particular tribe, then another tribe, which would not benefit, is not entitled to tribal shares with respect to that project.

For example, a tribe might argue that under an allocation methodology for tribal shares, it is entitled to its share of the entire appropriation for

²⁰Lincoln v. Vigil, 113 S.Ct 2024, 2031 (1993).

²¹Id. at 2032.

²²See section 302 of the Indian Health Care Improvement Act.

facilities, including funds for particular projects. If the tribe takes "its share", there may not be sufficient remaining funds to construct the health care facilities for which Congress included funds in the appropriation. Similarly, a tribe might argue that it is entitled to its share of sanitation facilities construction funds. If IHS provides these tribes with their "share" of such funds, it may violate Congressional intent that these funds be allocated on a priority basis. If the agency provides tribal shares in such cases, it may face severe criticism from Congress.

Therefore, in calculating tribal shares, the agency should consider the amount it would otherwise have provided for the program under section 106(a) together with any applicable legislative history.

IV. PAYMENT OF FUNDS

As discussed above, if a tribe desires it may choose to identify funds in its AFA for construction and obligate and expend such funds under a Title I construction contract, a Title I grant, or, in the case of sanitation facilities, through an agreement authorized under the ISFA. In such a case, payment of funds would be governed by section 105(b) of ISDA which states:

Payments of any grants or under any contracts pursuant to sections 102 and 103 of this Act may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this title. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursements thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds.

We understand that the IHS currently is considering various legal instruments for constructing facilities, e.g., grant, a cost-reimbursement contract, a fixed-price contract, etc. Notwithstanding the type of instrument used, the transfer of funds must minimize the time elapsing between the transfer of such funds from the Treasury and the disbursement by the tribal organization.

In conclusion, the Comptroller General has determined that an agency must have express statutory authority to use Federal funds to improve non-governmental property. While funds may be identified in an AFA for construction of health care facilities or for sanitation construction, such funds must be used under an appropriate instrument pursuant to statutory authority, e.g., Title I contract, Title I grant, agreement authorized by ISFA, etc.²³ In determining funds available for tribal shares, the agency should consider the applicable sections of ISDA noted above, inherently Federal functions which the agency must carry out, and congressional intent with respect to funding particular projects. Finally, the agency has fairly broad discretion with respect to the payment of funds under a Title I contract or grant and should consider what is most advantageous in carrying out the purposes of ISDA.

I hope this information is helpful to you. If you have further questions, please feel to give me a call at 301-443-0406.



Barbara Hudson

cc: Richard McCloskey, Director
Division of Legislation and Regulations

²³Funds also may be used as authorized by the Indian Health Care Improvement Act.